HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIM. WRIT PETITION NO. 1814 OF 2005

Smt. Rashida Kamaluddin Syed & Anr. ..Petitioners.
Versus.
Shaikh Saheblal Mardan & Anr. ..Respondents.

Shri. Sadashiv G. Deshmukh for the Petitioners.
Smt. S.V. Gajare, A.P.P. for the Respondent - State.
Shri Vikas B. Tapkir for Respondent No.1.

CORAM: A.M. KHANWILKAR, J.
DATE : DECEMBER 15, 2005.

P.C.

1. Heard Counsel for the parties. Perused the documents on record. The first grievance of the Petitioners is that the order passed on August 4, 2004 rejecting the application preferred by the accused Nos.1 and 2 for discharge is not only untenable but is a clear case of non application of mind and error apparent on the face of record. The argument proceeds that the order refers to the order passed below Exhibit 1 for which reason the application preferred by the accused came to be rejected. However, from the record it is seen that the order passed below Exhibit 1 is of a posterior date i.e. dated August 25, 2004. In other words the order below exh.1 was not in existance when the application preferred by the petitioners came to be rejected on August 4, 2004. Even if this argument is to be accepted as it is, from the record it is seen that before passing of the order of framing of charges on August 25, 2004, the accused have been heard by the Court. That fact is

recorded in order dated 25th August 2004. Considering the submissions made before the Trial Court, the Court proceeded to pass the order on August 25, 2004 of framing the charge against the Petitioners. In other words, the petitioners have been heard by the trial Court before framing of the charges. It would have been a different matter, if the grievance of the petitioners were to be that they were not offered any hearing before framing of the charge at all. Even across the bar, learned counsel for the Petitioners fairly accepts that it is not possible to argue to the contrary than the fact recorded in order dated 25th August 2004 so as to contend that the petitioners were not given opportunity of being heard before framing of charge. Viewed in this perspective, the argument as is canvassed so as to overcome the order dated August 25, 2005 does not commend to me. On the contrary, it is seen that charge has been framed vide order dated 25th August 2004, and as mentioned earlier, after providing an opportunity of being heard to the accused concerned.

2. It is next contended by Shri. S. Deshmukh, counsel for the petitioner that the charge as framed smacks of non application of mind, in as much as the second charge framed reads thus:

"Secondly that you both in furtherance of common intention that in abovementioned period you cheated complainant, Shaikh Shaibuddin Saheblal by dishonestly inducing him to deliver the property of Shaikh Saheblal Mardan to you and that you have thereby committed an offence punishable under section 420 read with 34 of Indian Penal Code and with my cognizance."

3. It is argued that reference is made to complainant as - Shaikh Shaibuddin Saheblal, whereas the original complaint was filed by Shri Shaikh Saheblal Mardan. In other words there is no question of dishonestly inducing the present complainant who is the legal representative of Saheblal Mardan - the original complainant. To this extent there is substance in the grievance made on behalf of the Petitioners. However, that by itself cannot be a ground for discharge. It is well settled that it is open to the Trial Court to alter and/or amend the charge at any stage of the proceedings. The mistake which is pointed out on behalf of the Petitioners to me, is one of clerical error, which can always be corrected by the Trial Court at appropriate stage and if brought to the notice of that Court.

4. The fact remains that the charge is one of cheating the Complainant (Original Complainant); that is the sum and substance of the second charge. That will have to proceed on its own merits. I am not impressed by the argument that on account of the said mistake this

Court should assume that the order of framing of charge passed by the Trial Court is without application of mind.

5. It is next contended that the charge has been framed after recording of evidence and there is absolutely no evidence to frame charge against the Petitioners. Even this submission does not commend to me. The Trial Court has rightly adverted to the deposition of P.W.1 and on fair reading of the said deposition the conclusion reached by the Trial Court to frame charges against the Petitioners for offences punishable under sections 406 and 420 read with 34 of Indian Penal Code is unexceptionable. There is material on record on the basis of which the Trial Court has proceeded to frame those charges. To getover this position, Shri S.G.Deshmukh, Counsel for the Petitioner contends that evidence of Bank Official does not support the prosecution case. That does not mean that there is no evidence at all. The question of discharge would arise when there is absolutely no legal evidence to frame the charge. The fact that the evidence of Bank Official does not support the prosecution case would be relevant at the trial and can be the basis to pass the appropriate orders, as may be advised. However, I see no substance in the present petition. The same is dismissed.

6. At this stage, Counsel appearing on behalf of the Petitioners submits that the Petitioners would like to take up the matter in appeal. The Ad-interim order which was granted by this Court to continue for a further period of six weeks from today.

(A.M.KHANWILKAR, J.)